Supreme Court, U.S.
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No. 87-1279

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. (& Supp. III) 591-598.[1] The Act provides that a special division of an Article III court may appoint an independent counsel to

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[1] Those provisions were amended and reenacted by the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293, which took effect on December 15, 1987. Pursuant to Section 6(b) of the 1987 Act, 101 Stat. 1307, proceedings like this one that were already pending prior to December 15, 1987, generally continue to be governed by the original independent counsel provisions, although certain limited provisions of the new law apply. The applicable new provisions are concerned with attorneys' fees, financial accounting, conflict-of-interest and financial disclosure rules applicable to independent counsels and their staffs, custody of records, and judicial review of a removal of an independent counsel from office. Neither those provisions nor other changes made by the 1987 Act fundamentally alter the constitutional issues presented in this case.

conduct certain criminal investigations and prosecutions of offenses against the United States (28 U.S.C. 593, 594). It gives the Attorney General the responsibility to make preliminary investigations and, in certain circumstances, to request appointment of an independent counsel (28 U.S.C. (& Supp. III) 591, 592); the Department of Justice is also responsible for the provision of funding to independent counsels (28 U.S.C. 594(d); see also § 2, 101 Stat. 1301 (to be codified at 28 U.S.C. 594(d)(2))). When an independent counsel is appointed to investigate a particular matter, the appointment automatically suspends the prosecutorial authority in the matter that would otherwise lie in the Department of Justice; the exercise of the Department's prosecutorial authority would be subject to the supervision of the Attorney General, who is appointed by the President and serves at his pleasure (28 U.S.C. 503, 516-519).

The President and the Department of Justice have a strong and direct interest in this case, and the Solicitor General plans to present their views as amicus curiae. The validity of the Act affects the Executive Branch as a whole and directly affects the continuing responsibilities of the Attorney General and the Department: it determines whether new requests for appointment of independent counsels are to made, whether continued funding is to be provided to independent counsels, and whether the Department is to pursue criminal investigations that would, under the Act, instead be referred to an independent counsel. Moreover, any examination of the constitutionality of the Act involves fundamental questions concerning the Constitution's allocation of authority within the federal government, questions of vital interest to the President and to the Executive Branch as a whole. Further, the independent counsel statute itself specifically contemplates that the Solicitor General may "mak[e] a presentation as amicus curiae" on issues of law raised in

cases to which an independent counsel is a party (28 U.S.C. 597(b)).

2. We agree with appellant (J.S. 29) that the Court should note probable jurisdiction to review the decision of the court of appeals (J.S. App. 1a-128a) invalidating the independent counsel provisions of the Ethics in Government Act. As appellant notes (J.S. 2), appellate jurisdiction is proper under 28 U.S.C. 1252, since the court of appeals struck down federal legislation as unconstitutional, and this civil-contempt proceeding is civil in nature (see *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966); H.R. Rep. 91-1549, 91st Cong., 2d Sess. 46 (1970)). And although we believe that the court of appeals correctly invalidated the independent counsel provisions, we agree with appellant (J.S. 26) that the question of their constitutionality is "so substantial as to require plenary consideration" (Sup. Ct. R. 15.1(h)). Several independent counsels currently hold appointments under the Act[2]; the constitutionality of the Act presents a question of great importance concerning the distribution of powers among the Branches of the Government; and summary disposition would be inappropriate.[3]

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[2] We note, however, that all independent counsels have been offered, and some have accepted, parallel appointments by the Attorney General, so that their activities as prosecutors may be conducted without impediment on account of the constitutional defects of the Act. Appellant rejected such a parallel appointment. See J.S. App. 17a-18a; *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), cert. denied, No. 87-869 (Jan. 19, 1988).

[3] Appellant contends (J.S. i, 23-26) that appellees' challenge to the constitutionality of the independent counsel provisions is not "ripe." The court of appeals ruled that the challenge was ripe and that, in any event, appellant could not raise her ripeness argument, which she failed to raise in the district court (J.S. App. 9a n.6). In the court of appeals, we briefly indicated (U.S. Amicus Br. 2) that the constitu-

Although the interests of the President and the Department of Justice would justify intervention, we have refrained from moving to intervene.[4] We do, however, propose to participate fully in this case as amicus (see 28 U.S.C. 597(b)). We therefore address two procedural matters raised by appellant. First, we are prepared to meet any briefing and argument schedule this Court sets, including that proposed by appellant (Mot. to Expedite 6). Second, we believe that the case will likely warrant two hours of oral argument, though that matter need not be resolved now. Cf. *id.* at 6-7 (proposing one and one-half hours for oral argument, but noting that more time may be necessary if counsel for non-parties such as the Solicitor General are granted argument time). At an appropriate

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tional challenge appeared to be ripe. We will address the ripeness issues further if this Court notes probable jurisdiction. At this stage, we simply note that those issues should not stand in the way of full briefing and argument on the court of appeals' invalidation of the independent counsel provisions. To render such briefing and argument unnecessary, this Court would have to reverse summarily both of the court of appeals' ripeness rulings. Appellant does not suggest that course, and we agree that the ripeness questions would benefit from plenary consideration along with the constitutional issues.

[4] Section 597(b) makes clear the Solicitor General's right to "mak[e] a presentation as amicus curiae," but it does not restrict the right to intervene in an appropriate case. The separate and substantial interests of the President and the Department are of course most apparent in a case presenting a challenge to the Act itself. Section 597(b), although plainly applicable here, was presumably intended to provide for participation in cases brought under the Act that raise, *e.g.*, criminal procedure issues in which the Justice Department would have an interest, most often parallel to that of the independent counsel.

time, after further consultation with the parties to this case, we plan to seek leave to participate in the oral argument so that we may orally "mak[e] a presentation" (28 U.S.C. 597(b)) to the Court.

Respectfully submitted.

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Solicitor General

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